Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1746

JOHN B. KILROY, SR.,
Petitioner,

v.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; PAUL DEFALCO, JR., in his official capacity as Regional Administrator, Region IX, United States Environmental Protection Agency; THE STATE WATER RESOURCES CONTROL BOARD; JOHN E. BRYSON, in his official capacity as Chairman of the State Water Resources Control Board; REGION IV OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD; and RAYMOND M. HERTEL, in his official capacity as Executive Officer of Region IV of the California Regional Water Quality Control Board,
Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. Clean Water Act § 511(c) Does Not Preclude the Issuance of an Injunction in this Case	1
II. This Case Is Not Moot	3
CONCLUSION	6

TABLE OF AUTHORITIES

Pages

CASE

Costle v. *Pacific Legal Foundation*, 48 U.S.L.W. 4243 (1980) 3,6

STATUTES

Clean Water Act § 502(11) 2
§ 502(17) 2
§ 511(c)(1) 1,2, 3,5
33 U.S.C. § 1362(11) 2
33 U.S.C. § 1362(17) 2
33 U.S.C. § 1371(c)(1) 1

REGULATIONS

40 C.F.R. § 35.905 (Sept. 27, 1978) 5
40 C.F.R. § 39.915(a) (Sept. 27, 1978) 5
40 C.F.R. § 39.915(g) (Sept. 27, 1978) 5

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PETITIONER'S REPLY BRIEF

I

CLEAN WATER ACT § 511(c)(1) DOES NOT PRECLUDE THE ISSUANCE OF AN INJUNCTION IN THIS CASE

This petition was filed because the courts below ruled that Clean Water Act § 511(c)(1), 33 U.S.C. § 1371(c)(1), prohibited the issuance of an injunction which would stop the

implementation of a project being funded by the Environmental Protection Agency (EPA) with Clean Water Act funds required environmental impact statement (EIS) had been prepared. The courts based this ruling on their determination that the particular disputed project (known as the Hyperion Treatment Plant Interim Sludge Disposal Project) was a condition of the National Pollutant Discharge Elimination System (NPDES) permit issued to the City of Los Angeles. The courts reasoned that, as a condition of the permit, the specific alternative disposal project which Kilroy is challenging would fall under the Section 511(c)(1) exemption from the EIS requirement.

The federal respondents have now confessed to this Court that the decisions of the courts below were in error. It is now acknowledged that "the 1975 permit did not identify the precise way in which the City would choose to discontinue its sludge discharges." Brief for the Federal Respondents in Opposition at 7. It is explained that the permit "merely required that some facilities be constructed in accordance with the schedule as a means of prompt compliance with the prescribed schedule."[1] It is clear, therefore, that it is the conditions of the *grant* and not the permit which require the designated trucking and dumping project. However, as explained in the petition for certiorari, both the trial court and the Court of Appeals based their holdings on the contrary assertion by the federal defendants in the trial court that the specific alternative disposal project was a

[1] Clean Water Act § 502(11) and (17), 33 U.S.C. § 1362(11) and (17), define a "schedule of compliance" in a permit as directed toward achievement of effluent limitations or other limitations, prohibitions, or standards on discharges such as the requirement that the sludge discharge be terminated. Such schedules do not mandate specific projects such as the Hyperion Treatment Plant Interim Sludge Disposal Project.

condition of the permit.[2] This admission of error supports the request of petitioner Kilroy that the decision of the United States Court of Appeals for the Ninth Circuit should be summarily reversed and remanded for reconsideration of the application of Clean Water Act § 511(c)(1) in light of this admission by the federal respondents and the decision of this Court in *Costle* v. *Pacific Legal Foundation.* 48 U.S.L.W. 4243 (1980).

II

THIS CASE IS NOT MOOT

In spite of the admitted error, it is suggested that the petition should be denied because an injunction[3] against the Hyperion Treatment Plant Interim Sludge Disposal Project would interfere with permit requirements setting a compliance schedule for the termination of the ocean discharge of sludge or because "[s]ubsequent events have all but mooted this case."

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[2] After admitting the error, respondents defend the result of the decisions by claiming that "plaintiffs had also sought a preliminary injunction against EPA's policy to eliminate the disposal of sludge in the ocean." Brief for the Federal Respondents in Opposition at 4 n.3. This claim is inaccurate. The request for injunction is accurately quoted by the federal respondents in the text on page 4 of their brief. It was directed solely to the implementation of the disputed interim sludge project, including trucking and dumping; it did *not* request that the schedule for termination of the sludge discharge be enjoined. Therefore, the substantial portion of respondents' opposition which attempts to support the refusal to enjoin the schedule for the termination of the sludge discharge is irrelevant.

[3] Petitioners submit that the injunction at issue in this case is not in the nature of a "preliminary" injunction as indicated in respondents' opposition. Although the motion as filed requested a preliminary injunction, the case on the merits was conceded by the federal defendants in the trial court before the motion was heard. *See* Appendix C to Petition for Certiorari. Therefore, the trial court's ruling was directed to whether an order in the nature of a permanent injunction should issue pending completion of the EIS.

Brief for the Federal Respondents in Opposition at 9. In fact, only issues relating to the old compliance schedule for terminating the discharge are moot. The dispute over the alternative sludge disposal method is very much alive and EPA has not completed an EIS for this project. The compliance schedule in the 1975 permit is meaningless—its effective dates having long since past. A new compliance schedule has been established in a consent decree[4] which sets July 1, 1985, for full implementation of the termination of the sludge discharge. There is ample time to prepare an EIS for alternative sludge disposal projects within the time frame established by the consent decree.[5] Moreover, respondents' statement that the consent decree "evidences the City's abandonment of the interim sludge project" (Brief for the Federal Respondents in Opposition at 9 n.8) is less than accurate. The City has never favored EPA's preferred trucking and dumping project. The City itself was concerned with the negative environmental consequences of such an ill-conceived project and requested EPA to prepare an EIS prior to requiring the implementation. The consent decree requires the termination of the sludge discharge and indicates that the City will *attempt* to achieve that requirement with the Hyperion energy recovery system. The consent decree does *not* state that trucking and dumping will not occur and attorneys for EPA refused a request by attorneys for Kilroy that a provision be included in the consent decree which would preclude the use of trucking and dumping. It must be emphasized that EPA makes reference only to what it claims are the City's intentions. It has made no statements concerning the status of its own decision on the trucking and dumping alternative.

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[4] *See* Brief for the Federal Respondents in Opposition at 9.

[5] Work began over three years ago on an EIS which "will include a detailed analysis of the potential environmental impact of the Interim Sludge Disposal Project. This analysis will include a discussion of alternatives to the Interim Sludge Disposal Project." Appendix C to Petition for Certiorari at C-4.

The decisions below hold that the trial court is precluded by law from issuing an injunction if EPA is funding a project for the purpose of contributing towards the achievement of an NPDES permit condition. The effect of this holding is devastating on those such as Kilroy who desire to exercise the right created by Congress for interested persons to participate effectively in EPA's decisions relating to the environmental consequences of the construction of wastewater treatment facilities. Under EPA's grant regulations, project funding is to be directed to "enforceable requirements of the Act." *See, e.g.,* 40 C.F.R. § 39.915(a) and (g) (Sept. 27, 1978). This phrase is defined to mean conditions or limitations set forth in an NPDES permit. 40 C.F.R. § 35.905 (Sept. 27, 1978). Therefore, most if not all major construction activities financed by EPA under the Clean Water Act are for the purpose of complying with discharge conditions or limitations in a permit. The facts of this case make it abundantly clear that EPA will take advantage of this major precedent to shield these projects from the public scrutiny and critical review which Congress intended should occur through the EIS process. Only action by this Court can reverse this clearly erroneous interpretation of Clean Water Act § 511(c)(1).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit summarily reversed and remanded for reconsideration in light of the admissions by federal respondents and the decision of this Court in *Costle* v. *Pacific Legal Foundation.*

Respectfully submitted,

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